In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. 274.

GENERAL INVESTMENT COMPANY, *Appellant*,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT.

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(30,864)

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Cases and Authorities Cited.

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STATEMENT.

This case is a sequel to that of *General Investment Company v. Lake Shore and Michigan Southern Railway Company, et al.*, 260 U. S., 261. (R. 15, 16.)

The threatened illegal consolidation of various lines of railroad into The New York Central Railroad Company, which the former suit sought to enjoin, was in form consummated during its pendency. That suit was commenced in a State court, and, for that reason, (p. 288) "so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice." In answer to the further question presented by the record in that suit, "Did the bill show a right to relief in equity because of infractions of State constitutions and laws?" this Court held that, under the circumstances disclosed by the bill, the plaintiff failed (pp. 289, 290) "to point out with precision and certainty in what respects the law is about to be vio-

lated and to show clearly and positively, substantial and irreparable injury to its private rights." The dismissal of that suit was thereupon qualified so as to be (pp. 289, 290) "without prejudice as to *all* parts of the bill."

The present suit, was originally commenced in the District Court for the Northern District of Ohio, Eastern Division, and the bill alleges (R. 15, 16) the relation of the present to the former suit; points out with precision and certainty the violations of the Sherman Anti-Trust Act, the Clayton Act and various State constitutions and laws (R. 11 to 13); and shows the plaintiff's interest as a minority stockholder in the New York Central and Lake Shore Companies, and the irreparable injury and damage to its private rights from the proposed consolidation, and to the rights of the other minority stockholders, in whose behalf also it sues. Paragraphs 4, 13 and 14 of the bill (R. 2, 14).

On motion of the defendant the present suit was dismissed for want of jurisdiction. On certificate of the district judge the plaintiff brings this direct appeal.

ARGUMENT.

This Court ruled in the former case (260 U. S., 261, 288), "that so much of the bill as based the right to relief on asserted violations of the Sherman Anti-Trust Act and the Clayton Act, was rightly dismissed; but the dismissal, being for want of jurisdiction, should have been without prejudice." The fact that the suit was brought in a State court was the sole ground of dismissal (R. 286, 287). At p. 287 the opinion quotes the proviso of the sixteenth section of the Clayton Act, (38 Stat. L., 730); but the "without prejudice" implies a refusal to construe said proviso in such manner as to exempt a railroad carrier engaged in interstate commerce from being sued under favor of said section by a minority stockholder for injunctive relief "in

respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission," as conferred afterwards upon the Commission in the amendment to the Interstate Commerce Act which was added in 1920 by the Transportation Act (Sec. 5, (6), 41 Stat. L., 480).

When the Clayton Act was passed, the Interstate Commerce Commission had no jurisdiction of railroad consolidations. *Cf., In re Heath*, 144 U. S., 92, 94, wherein, with reference to the construction of a jurisdictional statute which adopts provisions of another statute, it is said, "And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it." And see 25 *Ruling Case Law*, p. 908, Sec. 160. Compare also, with reference to the independent basis of equitable jurisdiction whereby stockholders' suits are maintainable to enjoin *ultra vires* and unlawful acts threatened by their own corporations, notwithstanding a statutory prohibition of direct suits for similar injunctive relief, *Brushaber v. Union Pacific R. R.*, 240 U. S., 1, 10; *Stanton v. Baltic*, 240 U. S., 103; *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429; *Dodge v. Wolsey*, 59 U. S., 331.

In the present complainant's former suit, *General Investment Co. v. Lake Shore and Michigan Southern Railway Company, supra*, (260 U. S., 261, 285, 286) service on The New York Central and Hudson River Railroad Company was quashed because that company was not domiciled within the district; but the court denied the contention that, as to its co-defendant, the Lake Shore Company, it was an indispensable party or that "its participation in the agreement for the consolidation gave it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders

of the several companies. It had not been ratified by the stockholders of the Lake Shore Company, and they were under no obligation to ratify it."

The complainant's Lake Shore stock consisted of five shares acquired before the stockholders adopted the agreement but after the directors had voted upon it. More than nine-tenths of the Lake Shore Company's capital stock was owned by the New York Central and Hudson River Railroad Company, and in the latter company the complainant was interested as a shareholder to the extent of $30,000 par value of its stock, all of which had been acquired by it before either company had taken any action whatever looking to consolidation.

In these circumstances this Court held (p. 285) that "As to so much of the bill as sought to enjoin the New York Central [and Hudson River Railroad] Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process, no other course was open than to dismiss that part of the bill."

The amount and the time of acquisition of the shares of the plaintiff, when viewed merely as a Lake Shore stockholder in the suit as thus narrowed, though no bar to its maintenance generally, were held to be not without weight in adjudicating matters discretionary or doubtful (pp. 282, 289). As upholding the right of a stockholder in such circumstances to sue, see *Dickerman v. Northern Trust Company*, 176 U. S., 181, 192; *Bloxam v. Met. Ry.*, L. R. 3 Ch. App., 337; *Seaton v. Grant*, L. R., 2 Ch. App., 459; *Elkins v. Camden & Atlantic R. R.*, 36 N. J. Eq., 5; *S. Dakota v. N. Carolina*, 192 U. S., 286, 311; *Blair v. Chicago*, 201 U. S., 400, 448; *Williamson v. Osenton*, 223 U. S., 619, 625; *3 Cook*

on Corporations, 7th Ed., Secs. 736 & 737; and note 2, p. 2681; *Forrester v. B. & M. Consol. Copper & Silver M. Co.*, 21 Mont., 544; *Venner v. Pa. Steel Co. of N. J.*, 233 Fed., 407. But in the present case, the complainant properly bases its right to sue upon its shareholdings in both of these old companies; and in these circumstances its interest, though unchanged, can not now be deemed either untimely or inconsiderable. Pars. 4, 5 and 14 of the bill (R. 2, 3, 14).

Section 16 of the Clayton Act (38 Stat. L., 737) opens the door to private suit for injunction "against threatened loss or damage by a violation of the Anti-Trust laws, including Sections 2, 3, 7 and 8 of this act," etc. Sec. 1 of the Sherman Anti-Trust Act (26 Stat. L., 209) provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Section 7 of the Clayton Act (38 Stat. L., 731) forbids particularly the acquisition of stock by one corporation in another or others for the purpose of lessening competition.

The intercorporate stock control of these parallel and normally competing lines of railway, which was further cemented by the consolidation of some of them into the New York Central Railroad Company, with the resulting acquisition by said new company of unlawful controlling interests in the capital stock of the Michigan Central, Big Four, Nickel Plate and other railroads paralleling its own and each other's lines, is fully set forth in paragraphs 5 to 11, inclusive, of the bill (R. 3 to 11), and need not be repeated.

The dismissal of the present bill for want of jurisdiction was based upon the erroneous assumption that, since the amendment of Sec. 5 of the Interstate Commerce Act

on February 28, 1920 (41 Stat. L., 480) so as to give the Interstate Commerce Commission jurisdiction of railroad consolidations, and as touching the grounds for relief reasserted in the present bill, the qualification "without prejudice" annexed to the dismissal of the former suit was but a barren judicial gesture, because the proviso in Section 16 of the Clayton Act (38 Stat. L., 730) now applies alike to the complainant, the defendant and to the subject matter of the present suit, so as to bar its maintenance.

It is enough to point out that this Court in the former case, which was decided Nov. 27, 1922, obviously did not take that view. The view that it did take has already been discussed at the outset of this brief; and it is plain that all the grounds, set forth in the opinion of this Court, for the dismissal of the several parts of the former bill (without prejudice), have now been obviated.

The dismissal of the present bill should be reversed on the authority of *General Investment Co. v. The Lake Shore and Michigan Southern Railway Co., et al.*, 260 U. S., 261, cited *supra*.

Respectfully submitted,

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